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No. 99-1815

Supreme Court, U.S.
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In The Supreme Court Of The United States

National Labor Relations Board, Petitioner

v.

Kentucky River Community Care, Inc., et al.,

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

Michael W. Hawkins
Counsel of Record
for Respondent
Kentucky River Community
Care, Inc.
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

17 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether there exists a conflict among the court of appeals as to whether nurses are supervisors under the National Labor Relations Act ("Act") and, therefore, excluded from the Act?

2. Whether the Sixth Circuit's decision that the National Labor Relations Board ("NLRB") has the burden of proving that employees are not supervisors under the NLRA is a matter of such importance that it requires review by this Court?

CORPORATE DISCLOSURE STATEMENT SUBMITTED PURSUANT TO S.CT. RULE 29.6

Respondent Kentucky River Community Care, Inc. ("KRCC") has no parent corporation and there is no publicly held company owning 10% or more of the corporation's stock.

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II. THE SIXTH CIRCUIT'S DECISION THAT THE NLRB HAS THE BURDEN OF PROVING THAT EMPLOYEES ARE NOT SUPERVISORS UNDER THE NLRA IS NOT A MATTER OF SUCH IMPORTANCE THAT IT REQUIRES REVIEW BY THIS COURT. 7

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ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THERE IS NO CONFLICT AMONG THE COURT OF APPEALS AS TO WHETHER NURSES CONSTITUTE "SUPERVISORS" UNDER THE NATIONAL LABOR RELATIONS ACT ("ACT") AND, THEREFORE, EXCLUDED FROM THE ACT.

Different factual scenarios in each case addressed in the National Labor Relations Board's ("NLRB") Petition For A Writ Of Certiorari account for the NLRB's allegation that a "conflict" exists among the courts.

Contrary to the NLRB's allegations, there is no "conflict" or "split" among the court of appeals as to whether nurses constitute "supervisors" under the Act. The NLRB alleges that this "conflict" among the court of appeals results from some of the court of appeals rejecting the Board's interpretation of "independent judgment" as used in defining a supervisor under § 2(3) of the Act, 29 U.S.C. § 152(11), and other court of appeals upholding the Board's interpretation of this term. Specifically, in its Petition For A Writ Of Certiorari, the Board stated:

> The Sixth Circuit's rejection of the Board's interpretation of "independent judgment," although consistent with decisions of the Third and Fourth Circuits, directly conflicts with decisions of the D.C, First, Seventh, Eighth and Ninth Circuits, which have accepted the Board's interpretation. [Citations omitted].

See NLRB's Petition at 19.

Yet, different factual scenarios in each case account for the NLRB's allegation that a "conflict" exists among the court of appeals. The fact that different factual scenarios account for the different holdings is best exemplified by the most recent court of appeals decision addressing the issue of whether nurses are supervisors under the Act - Schnurmacher Nursing Home v. N.L.R.B., 2000 WL 719507 (2d Cir. 2000).

In Schnurmacher, the Second Circuit upheld the Board's interpretation of "independent judgment" with respect to certain duties of the nurses at issue, and rejected the Board's interpretation of "independent judgment" with respect to other duties of the same nurses.[1] Specifically, the Second Circuit overturned

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[1] To be deemed a supervisor under § 2(11) of the Act, an employee must have authority to engage in one of 12 specified supervisory functions (i.e., hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, responsibly to direct them,

the Board's decision that the charge nurses at issue did not exercise "independent judgment" when responsibly directing certified nurse assistants ("CNAs") in providing necessary patient care. Schnurmacher, 2000 WL 719507, *7. Yet, the Second Circuit upheld the Board's decision that the same charge nurses did not exercise "independent judgment" when they assigned CNAs to patients and scheduled their break times. Id. at *5. Notably, no where in the Schnurmacher decision did the Second Circuit refer to or acknowledge a "split" or "conflict" among the circuit court of appeals over the issue at hand. Id.

The fact that different factual scenarios account for the alleged "conflict" among the courts is also exemplified by the fact that the cases alleged to be in conflict by the NLRB vary as to the type of nurses involved (e.g., licensed practical nurses, registered nurses, and/or charge nurses.), the setting in which the nurses operate (e.g., hospital, nursing home, mental health care facility, acute care hospital, "subacute" nursing care facility) and the particular duties and responsibilities of each nurse involved (e.g., existence of disciplinary and/or scheduling authority, etc.). See Schnurmacher, 2000 WL 719507 at *1-2 (15 RN and

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adjust their grievances, or effectively to recommend such action) and must exercise that authority "in the interest of the employer," using "independent judgment." 29 U.S.C. § 152(11).

LPN nurses at a 245-bed nursing home whose responsibilities included, among other things, directing CNAs in providing necessary patient care and assigning CNAs to patients and scheduling their break times); N.L.R.B v. Attleboro Associates, Ltd., 176 F.3d 154 (3d. Cir. 1999) (24 LPNs at a 180-bed nursing home whose responsibilities included, among other things, recommending discipline for CNAs, adjusting CNAs' grievances, assigning tasks to CNAs, and responsibly directing CNAs in completing their duties effectively); Beverly Enterprises, Virginia v. N.L.R.B., 165 F.3d 290 (4th Cir. 1999) (6 LPNs in a 50-bed nursing home whose responsibilities included, among other things, deciding which nursing assistants work where, whether a nursing assistant's misbehavior warrants sending the nursing assistant home, and whether exigent circumstances require an evacuation of the nursing home); N.L.R.B v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999) (38 LPNs in a 282-bed nursing home whose responsibilities included, among other things, transferring CNAs to other wings within the facility when necessary, determining whether CNAs complete their tasks properly and in accordance with patient care requirements, performing CNA evaluations, issuing commendations to CNAs, and rearranging CNA break times); Providence Alaska Medical Center v. N.L.R.B., 121 F.3d 548 (9thCir. 1997) (25% of the approximately 700 RNs in a 341-bed acute care hospital whose responsibilities included,

among other things, determining whether facility is overstaffed or understaffed, approving breaks of other nurses, and filling out evaluations for other nurses); Beverly Enterprises v. N.L.R.B., 148 F.3d 1042 (8th Cir. 1998) (4 RNs and 10 LPNs employed as team leaders in a 54-bed nursing home whose responsibilities included, among other things, altering break schedules and patient care priorities, seeking volunteers to fill shift vacancies created when the registered nursing assistants (NAR) are absent, initialing NAR time cards, and reporting disciplinary problems); Integrated Health Services Of Michigan, At Riverbend, Inc., 191 F.3d 703 (6th Cir. 1999) (50 RNs and LPNs in a 157-bed "subacute" nursing care facility, whose responsibilities included, among other things, distributing the competency evaluated nursing assistants' ("CENA") work assignments, authorizing the CENAs' breaks and lunches, and engaging in certain disciplinary actions with respect to the CENAs); N.L.R.B. v. Hilliard Development Corporation, 187 F.3d 133 (1st Cir. 1999) (13 RNs and LPNs in a 112-bed residential nursing home for residents with mental illnesses whose responsibilities included, among other things, assigning work to the Mental Health Assistants ("MHAs"), adjusting the MHAs' grievances, and disciplining the MHAs); Beverley Enterprises-Pennsylvania, Inc. v. N.L.R.B., 129 F.3d 1269 (D.C. Cir. 1997) (LPNs whose responsibilities included, among other things, passing

medication, stocking the medical supply cart, accompanying doctors on rounds and occasionally offering evaluations of the CNAs).

Moreover, the Second Circuit in Schnurmacher rejected the suggestion that "charge nurse" is a term of art with a nationwide agreed-upon meaning and that its decision involved a significant dispute over an issue of law. Schnurmacher, 2000 WL 719507, *8, n.2. Instead, the Second Circuit held that its decision was based solely upon a factual record concerning the case at hand and did not purport to vest the title "charge nurse" with any legal significance detached from the actual responsibilities similar to those entrusted to charge nurses at the case at hand. Id. Such a finding further confirms that different factual scenarios, and not a court of appeals dispute over the definition of "independent judgment," account for the different court of appeals' decisions involving the supervisory status of nurses under the NLRA.

Further, as the Sixth Circuit stated in the opinion below ". . . we acknowledge that whether an employee is a supervisor is a highly fact-intensive inquiry, and therefore, each case must be scrutinized carefully." Kentucky River Community Care v. N.L.R.B., 193 F.3d 444, 453 (6th Cir. 1999), rehearing and suggestion for rehearing en banc denied (6th Cir.

2000).[2]

II. THE SIXTH CIRCUIT'S DECISION THAT THE NLRB HAS THE BURDEN OF PROVING THAT EMPLOYEES ARE NOT SUPERVISORS UNDER THE NLRA IS NOT A MATTER OF SUCH IMPORTANCE THAT IT REQUIRES REVIEW BY THIS COURT.

Finally, the NLRB alleges that the Sixth Circuit's decision that the NLRB has the burden of proving that employees are not supervisors under the NLRA is a matter of such importance that it requires review by this Court. However, the NLRB's allegation is erroneous. This is best demonstrated by this Court's

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[2] This case was the first case that the NLRB sought review by this Court concerning the alleged "conflict." Notably, the NLRB chose to seek review with respect to the Respondent, whose interest and resources to litigate this issue is very small compared to other potential respondents in this alleged "conflict" - e.g., Beverly Enterprises. See Beverly Enterprises, Virginia, Incorporated v. N.L.R.B., 165 F.3d 290 (4th Cir. 1999). This is best demonstrated from the facts that Respondent's RNs only constitute 6 of the 110 bargaining unit members and the main issue is this case was whether the Respondent constituted a "political subdivision" under the NLRA. See Kentucky River Community Care v. N.L.R.B., 193 F.3d at 453.

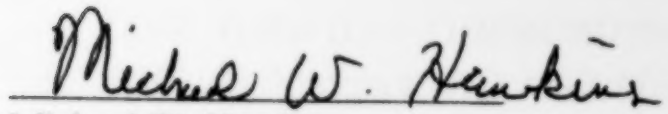
affirmative of the Sixth Circuit's decision in Health Care & Retirement Corp. of America v. N.L.R.B., 987 F.2d 1256 (6th Cir. 1993).

In Health Care & Retirement Corp., the Sixth Circuit held that the NLRB had the burden to prove the supervisory status of staff nurses in a nursing home. Health Care & Retirement Corp., 987 F.2d at 1259, 1261. Specifically, the Sixth Circuit stated, "Neither the ALJ's decision nor the Board's Order recognized that the burden rested not on HCR [the employer] but on respondent [the NLRB]. A burden which was not met." This Court affirmed the Sixth Circuit's decision in N.L.R.B. v. Health Care & Retirement Corporation of America, 511 U.S. 571, 114 S.Ct. 1778 (1994). In doing so, this Court made no mention, nor did it disapprove, of the fact that the Sixth Circuit placed the burden to prove the supervisory status of the nurses on the NLRB. Accordingly, the Sixth Circuit's decision that the NLRB has the burden of proving that employees are not supervisors under the NLRA is not a matter of such importance that it requires review by this Court.

CONCLUSION

This case does not warrant review by this Court. First, there is no conflict among the court of appeals as to whether nurses are supervisors under the NLRA. Second, the Sixth Circuit's decision that the NLRB has the burden of proving that employees are not supervisors under the NLRA is not a matter of such

importance that it requires review by this Court.



Michael W. Hawkins
Counsel of Record
for Respondent
Kentucky River Community
Care, Inc.
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200